

**CAUTION:** The following advice may be based on a rule that has been revised since the opinion was first issued. Consequently, the analysis reflected in the opinion may be outdated.

**IC 4-2-6-5 Performance of duties**  
**40 IAC 2-1-7 Appearance, activities and expenses**  
**40 IAC 2-1-8 Moonlighting**  
**DOC policy 03-01-304**

SEC deemed it was impermissible for a state employee to accept an expert witness fee in excess of the standard fact witness fee for testifying on his own time about matters related to the performance of his official state duties.

June 18, 1992  
No. 92-I-10

**FACT SITUATION**

The superintendent of one of the Department of Corrections' prisons, the Correctional Industrial Complex at Pendleton, Indiana, wanted to testify as a witness on his own time in an out-of-state trial and receive an expert witness fee. The trial in Sacramento, California, was an appeal of a death sentence against an inmate who had been incarcerated at the Indiana Reformatory in 1967 through 1969. At that time, the superintendent was employed at the Indiana Reformatory. The intent of the Sacramento, California public defender's office was to show that the inmate was a product of the prison system in Indiana, Michigan, and perhaps other states from the age of eleven and that the death penalty should be set aside in lieu of a life sentence without the possibility of parole. The superintendent was offered round trip airfare (at a value of approximately \$420), payment for meals, hotel and other basic expenses (\$100 a day), an expert witness fee of \$500 a day, and reimbursement on travel days (\$250 a day). If an employee testifies as a witness on state time, the state could be reimbursed for travel expenses but the employee could not accept a witness fee in addition to his state pay. Although the superintendent had received a subpoena to testify, the subpoena was signed by a deputy public defender and not by a court official and was therefore, without legal sanction.

Question

Is an employee of the Department of Corrections permitted to receive an expert witness fee, a fee on travel days, round trip airfare, payment for meals, and other travel expenses for being an expert witness on his own time in an out-of-state trial involving a prisoner but totally unrelated to any criminal activity in Indiana?

**OPINION**

The Commission found that it was not permissible for a state employee to accept an expert witness fee over and above the standard fact witness fee for testifying on the employee's own time about facts that arose out of the performance of the employee's state duties. However, the employee in this case was permitted to accept actual travel expenses for transportation, lodging, and meals, but not any additional fees for days spent traveling.

The relevant statute and rules are as follows:

IC 4-2-6-5 on performance of duties provides, "No state officer or employee shall solicit or accept compensation, other than that provided for by law for such office or employment for the performance of his duties; it shall be unlawful for any person, other than state officer or employees performing their duties in making payments to state officers or employees as provided by law, to pay, or offer to pay, any state officer or employee any compensation for the performance of his official duties."

40 IAC 2-1-7 on appearance, activities and expenses provides, "A state officer or employee shall not solicit or accept payment from any person for expenses, including but not limited to any

lodging, travel expenses, registration fees, food, or drink for appearance at any meeting, convention, conference, seminar, or similar activity for himself or herself or the individual's spouse or unemancipated child under circumstances in which it can reasonable be inferred that the thing of value would influence the state officer or employee in his or her official capacity. This section does not prohibit contributions which are accepted by an agency in accordance with applicable law."

"(b) Without the written approval of the employee's appointing authority or the state office, an employee shall not accept payment of expenses, including but not limited to lodging, travel expense, registration fees, food, or drink for attending events concerning state business from a person who has a business relationship with the employee's agency. An appointing authority or state officer may designate no more than one (1) person to exercise approval on behalf of the appointing authority or state officer. Such designation shall be in writing and filed with the commission."

40 IAC 2-1-8 on moonlighting provides, "A state employee must not engage in outside employment or other outside activity not compatible with the full and proper discharge of his public duties and responsibilities. This outside employment or other outside activity must not impair his independence of judgment as to his official responsibilities, pose a likelihood of conflict of interest or require him or persuade him to disclose confidential information acquired by him as a result of his official duties."

The Department of Correction's policy 03-01-304 (June 1, 1987) at number eleven says, "No staff person shall use a position with the Department, or use any knowledge obtained from that position, or use any state property for personal gain or the gain of others except as provided in the policy 02-00-113, 'The Development, Implementation and Review of Service Programs.'"